deplorable conduct dishonourable of him as a man and dishonourable of his profession.

As regards the second charge the respondent after giving his undertaking to the Attorney-General spent two hours discussing the validity of the search warrant and himself conducted no search, caused no search to be conducted outside of Ratnam's room and made no enquiries of anyone other than Ratnam whether there were any relevant files or documents which were kept outside of Ratnam's room. In fact the respondent did nothing at all to ensure, by all the means within his power and control, that he honoured his undertaking. It is to be observed that before he gave the undertaking he was already aware that Ratnam had in fact sometime earlier "caused some files to be brought to the 3rd room from the front portion because the police were coming to collect them and he wanted to prevent the police from getting them".

In our opinion on all the facts and circumstances it was not only gross misjudgment of Ratnam's character as is submitted to us by Mr. Kempster but it was also a gross failure on the part of the respondent to honour his undertaking to the Attorney-General. In our opinion the simple, obvious and normal step to take was for the respondent to give express orders and directions to every member of his staff to search every room of the office for any relevant files or documents. As events turned out that simple, obvious and normal step, if taken, would have resulted in the finding of the two files, the two deposit receipts and the seal of Gemini in the office of the respondent's firm. In our judgment it was culpable negligence on the part of the respondent in such circumstances as to amount to grossly improper conduct in the discharge of his profession.

Before we consider the penalty we should impose we should refer to one piece of evidence which was relied on by the respondent. It is a tape-recording by the respondent without Ratnam's knowledge of a telephone conversation he had with Ratnam after he had been asked for an explanation by the Inquiry Committee of the Law Society. We wish to make a general observation on the use of a tape-recording by a solicitor as supporting evidence in disciplinary proceedings against him. We deprecate it unless the solicitor informs the other person concerned that the conversation is being recorded on tape. In the present case this was not done. Moreover, the recording was made after the respondent had been informed that the Law Society was investigating into his conduct and accordingly, in our opinion, the weight to be attached to such evidence, if any, is minimal.

We take the view that these are serious dereliction on the part of the respondent for which an appropriate penalty would be suspension from practice for a period of one year and we so order. The period of suspension shall commence from the date of this order. In addition we order that the respondent pay all the costs before the Disciplinary Committee and before this court, including all the costs of the Law Society in these proceedings.

Order accordingly.

Solicitors: *Chor Pee & Hin Hiong.*

MALAYSIAN REPORTS

LAM SHES TONG & ORS. v. LAM KEE YING SDN. BHD.

[F.C. (Ong C.J. (Malaya), Gill and Ali F.JJ.) June 27, 1972]

[Kuala Lumpur — Federal Court Civil Appeal No. 7 of 1972]

Landlord and Tenant — Lease — Covenant not to assign, underlet or part with possession of premises — Lessee allowing company of which he is Chairman of Board of Directors use of premises — Whether breach of covenant — Equitable relief against forfeiture — National Land Code, s. 237.

This was an appeal against an order for possession of premises leased by the respondents to the first appellant. It was alleged that the first appellant as lessee had broken a covenant not to assign, underlet or part with the possession of the premises without the consent of the respondents. The first appellant originally carried on business on the premises in a partnership called Lian Joo Company but subsequently the partnership was converted into a limited company (the second appellants) of which the first appellant became the principal shareholder and managing director. The premises were occupied by the second appellants.

Held, allowing the appeal: (1) there was in fact no assignment of the lease in this case as the company was let into occupation of the premises on the same footing as the firm, by leave and licence of the lessee and there was therefore no breach of covenant which rendered the lease liable to forfeiture;

(2) in any event in the circumstances of the case, the first appellant was entitled to treat the company as his *alter ego* and was entitled to equitable relief against forfeiture as provided under section 237 of the National Land Code.

Cases referred to:

(1) *Salomon* v. *Salomon & Company Ltd.*, [1897] A.C. 22.

(2) *Tunstall* v. *Steigmann* [1962] 2 Q.B. 593, 600.

(3) *In re Westbourne Galleries Ltd.* [1972] 2 W.L.R. 1289, 1297.

(4) *Chaplin* v. *Smith* [1926] 1 K.B. 198.

(5) *Gian Singh* v. *Devraj Nahar* [1965] 2 M.L.J. 12.

FEDERAL COURT.

R. R. Chelliah (*Kam Woon Wah* with him) for the appellants.

J. L. Tan for the respondents.

Ong C.J.: The respondents were plaintiffs in an action claiming possession of leased premises from the first appellant, as lessee, for breach of a covenant not to assign, underlet or part with the possession of the demised premises without the consent of the respondents first obtained. The second appellants, a company incorporated in Malaysia and carrying on business at the premises, were sued for trespass. We allowed this appeal and now state in full the grounds of our decision.

The demised premises, comprising the entire ground floor of a shophouse No. 32 Jalan Silang, Kuala Lumpur, were leased originally by Lam Kee Ying and Lam Yoo Choo, then the registered proprietors, to Lam Shes Tong, trading as Lian Joo Company, for a term of 25 years from May 1, 1964 at a yearly rent of $6,000 payable monthly in advance at the rate of $500 per month. The lease contained the following relevant covenants by the lessee in clause (1): —

"(g) Not to assign underlet or part with the possession of the demised premises or any part thereof without the prior

written consent of the Lessors such consent not to be unreasonably withheld.

(i) To use the demised premises for carrying on business as general merchants whether trading as a sole-proprietor or in partnership thereof."

The lessors' covenants include the following under clause (2): —

"(d) In the event of Mr. Lam Kee Ying or his nominee is desirous of letting out the mezzanine floor, the lessee shall be given the first option to rent it at an additional monthly rental of $100, failing which the lessors are entitled to let it to others."

Lam Kee Ying became the sole proprietor and lessor of the premises on November 4, 1965. In succession to him the respondents, Lam Kee Ying Sendirian Berhad, became the registered proprietors on November 18, 1966. This company was formed by Lam Kee Ying to take over his personal assets and he is in control thereof as manager and governing director.

Lam Shes Tong, the first appellant, is a grandnephew of Lam Kee Ying. Before 1964 they were business colleagues and partners, with other persons, for eleven years, as textile merchants carrying on business in Malaya and Singapore under the style of Ban Joo Co. This partnership set up business at No. 32 Jalan Silang, Kuala Lumpur in 1962 with Lam Shes Tong having the management and control. On March 1, 1964 the partnership was dissolved. As his share of the assets Lam Kee Ying took over the premises No. 32 Jalan Silang and by an agreement in Chinese dated March 1, 1964 Lam Kee Ying agreed to lease the ground floor of these premises except the mezzanine floor to Lam Shes Tong as "the representative of Lian Joo Company" for a term of 25 years from April 1, 1964 at a monthly rent of $500. The terms set out in this Chinese document were reproduced in the memorandum of lease whereby the lessors expressly covenanted to give the lessee the first option to rent the mezzanine floor for an additional $100 per month: see clause (2)(d).

On November 25, 1964, however, this mezzanine floor was let to Tyma Co. Ltd. by Lam Kee Ying, without the lessee Lim Shes Tong being given the first refusal of the tenancy in accordance with the provisions of clause (2)(d). The excuse or explanation given by Lam Kee Ying was this: —

"Tyma Co. Ltd. belongs to me. I agree Tyma Company is a limited company. It has three shareholders — myself, my son and a relative of mine (Lam Chet Khoy and Liau Siak Fah). Tyma Company pays me $50 per month. When 1st defendant questioned my why I did not give him the first option *I told him Tyma Company was mine. There is no difference between me and Tyma Co. Ltd.*

Now I am doing construction business to lease out to people. My business address is at the premises at the mezzanine floor. The name Tyma Co. Ltd. has since been changed to Lam Kee Ying Sdn. Bhd. (the plaintiff company)."

Turning now to the lessee, Lam Shes Tong, he was at all times the managing partner of the firm Lian Joo Company. He is now the managing director of Sharikat Lian Joo Textiles Sendirian Berhad, the second appellants. The partnership had been converted into a company on August 13, 1969. The metamorphosis was only to this limited extent, as stated by Lam Shes Tong, the lessee: —

"I did not sublet or assign the premises to 2nd defendant company. I only changed Lian Joo Company into a limited company. The partners of Lian Joo Company are the shareholders of the limited company i.e. 2nd defendant company. There is no change and the shares in the original company are the same in the 2nd defendant company. The shareholders in the 2nd defendant company are:

(a) myself

(b) Low Yeo Foong

(c) Lam Sie Gin."

The respondent company on this ground, and this ground only, claimed forfeiture of the lease, alleging that, on or about August 13, 1969 — altered subsequently by amendment to November 13, 1969 — the lessee had assigned, underlet or parted with the possession of part of the premises to the second appellants without the consent in writing of the lessor being first obtained. Giving evidence, Lam Kee Ying stated as the ground of his objection "that the second defendant company is a limited company as distinct from defendant No. 1's company".

It is clear from the judgment of the learned trial judge that he gave judgment for the respondents solely on the principle enunciated in *Salomon* v. *Salomon & Co. Ltd.*[1] "that a company and the individual or individuals forming a company were separate legal entities, however complete the control might be by one or more of these individuals over the company" — following the judgment of Ormerod L.J. in *Tunstall* v. *Steigmann.*[2]

The judgment contained a brief reference to the maxim of equity — that he who comes to equity must come with clean hands. This point was raised concerning the failure by the lessors in breach of clause (2)(d) to give the first offer of the mezzanine floor for rent to the lessee. The application of equitable principles was, however, rejected by the judge on the following ground: —

"But under cross-examination D.W.1 (Lam Shes Tong) admitted that he came to know of the alleged breach as long ago as 1966 and as the first defendant has done nothing about it, it can safely be assumed that he has waived his rights under the agreement."

With respect, we think that maxim in that light had no relevance at all and the judge thus misdirected himself. In the instant case, the lessee was not claiming his right to the mezzanine floor, but equitable relief against forfeiture as provided under section 237 of the National Land Code. This most material section was nowhere referred to by the judge or either counsel. It reads: —

"(1) Any lessee, sub-lessee or tenant against whom any person or body is proceeding to enforce a forfeiture may apply to the court for relief against the forfeiture; and the court —

(a) may grant or refuse relief as it thinks fit, having regard to all the circumstances of the case (including, if the case is one to which the provisions of section 235 applied, the proceedings and conduct of the parties under that section); and

(b) if it grants relief, may do so on such terms as it thinks fit.

(2) The provisions of sub-section (1) shall have effect notwithstanding any provision to the contrary in the lease, sublease or tenancy in question."

In this connection it is essential to remember the *contra proferentem* rule when construing the covenants in this lease. It is a cardinal rule in the interpretation

of documents that an agreement is to be construed as the parties themselves intended it to mean. Where the covenant was binding on him, Lam Kee Ying had clearly considered that Tyma Co. Ltd. and Sharikat Lam Kee Ying Sdn. Bhd. were merely his *alter ego* and he conducted himself and his companies on that footing. In our view what is sauce for the goose should also be sauce for the gander. He had, by precept and example, demonstrated that treating a limited company as the *alter ego* of its members was not, in the case of this particular lease, a breach of covenant on his part. If his case was an exception to *Salomon* v. *Salomon & Co. Ltd.*[1] then the lessee under the same lease, should be entitled to the same liberal interpretation. To hold otherwise would be both unjust and erroneous.

A comparison between the two companies is indeed invidious to the respondents. In Lam Kee Ying Sdn. Bhd., the paid-up capital was $500,000 of which Lam Kee Ying himself was holder of only $3,000 in shares. This company was originally none other than Tyma Co. Ltd. — this name being changed to Lam Kee Ying Sdn. Bhd. by special resolution on March 14, 1966. "Tyma Co. Ltd. belongs to me", said Lam Kee Ying, and therefore the letting of the mezzanine floor to the Tyma Co. Ltd. was not in breach of clause (2)(d) of the lease. On the other hand, the total paid-up capital of Sharikat Lian Joo Textiles Sdn. Bhd. was $180,000 of which the majority of $100,000 in shares are held by Lam Shes Tong. When one looks at the true character of the two companies, it can hardly be denied that Lam Shes Tong in fact has a better right than Lam Kee Ying, to describe his company as his *alter ego*. The same three partners are shareholders in the new company; so that, if they were unobjectionable as partners occupying the demised premises, the objection to their company doing so, must in the highest degree be purely technical. The court cannot be blind to this fact in doing equity. As Lord Wilberforce said, in *In re Westbourne Galleries Ltd.*: —[3]

"The words ('just and equitable') are a recognition of the fact that a limited company is more than a mere judicial entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure."

On the facts, therefore, this clearly is a case where equitable relief should be granted and the judgment of the court set aside.

There was also another ground why in our opinion this appeal should be allowed, namely that the trial judge erred in finding as a fact that there was an assignment or subletting by the lessee in breach of covenant.

Lam Shes Tong in his evidence had stated that there was "in fact no sale agreement", nor did he sublet or assign the demised premises to the company. Counsel for Lam Shes Tong informed the learned trial judge that he had been unable to produce the sale agreement, pursuant to notice to produce, because there was no such agreement and, in our opinion, there was no reason why the sworn testimony of Lam Shes Tong should not have been accepted as true. We did not see why, as reasonable and honest businessmen, these three partners, who became the three shareholders in the company, should have gone through the motions of drawing up a formal document of sale to which the signatories would be nobody but themselves. There was no reason whatsoever, in the circumstances, for any such exercise in futility.

Lam Shes Tong, it will be remembered, was, in his capacity as lessee, in a position — quite legally and without any breach of the relevant covenant — to give the firm of which he was managing partner, leave and licence to use the premises in which to carry on the partnership business. In the company of which he was and is the Chairman of the Board of Directors and the majority shareholder, we thought he was no less capable of giving leave and licence to his own company to continue carrying on the same business as a going concern. Our authority for so holding is the (English) Court of Appeal decision in *Chaplin* v. *Smith*[4] where it was held that a lessee who has covenanted not to part with the possession of the demised premises does not commit a breach of the covenant by merely permitting another person to have the use of the premises, so long as the lessee retains the legal possession himself. The facts therein are indistinguishable from the relevant facts in the instant case. The judgments of their Lordships were unanimous and that case was approved by the Privy Council in *Gian Singh* v. *Devraj Nahar*.[5] The same principle must be held to apply here.

In answer to the arguments of counsel for the respondents, we should mention that we have not been unmindful of certain admissions made by Lam Shes Tong, in cross-examination: "When one took over business it would include the tenancy of premises... I agree that the change indicates transfer or assignment of tenancy...". These were answers made by a layman to leading questions. As such they should be read with a certain degree of caution and not accepted at face value, as distinct from admissions made by persons learned in the law. Each answer ought to be read in the context of the categorical statements given by Lam Shes Tong — that he did not sublet or assign the tenancy and that there was no sale agreement regarding the partnership assets taken over by the company. The answers, and each of them, were nothing more than *inferences* of law to be drawn from primary facts — provided those facts were proved or admitted. If those inferences, to which he expressed assent, were wrong in law, or based on false assumptions by counsel putting the leading questions, then in our opinion the alleged admissions counted for nought.

The trial judge stated six grounds for holding that the lessee had committed a breach of the covenant against assignment. The first was his inference from paragraph 3(a) of the Memorandum of Association, that the objects for which the company was established included the acquisition and taking over as a going concern of the business of Lian Joo Company and all or any of the assets and liabilities of the properties of that business in connection therewith. The sixth ground related to the admissions of the lessee in cross-examination above referred to. We did not, with

respect, think that the inference of an assignment was irresistible or even logical unless in no other way could the company have been at liberty to use the premises in succession to the partnership. It did not appear to have occurred to the judge to consider the likelihood, in the absence of proof to the contrary, that the company might well have carried on business in the premises on the same footing as the partnership had done.

In *Gian Singh's* case[5], the Privy Council declared that property used for partnership purposes is not necessarily partnership property. In the instant case there was no evidence that the lease was part of the partnership assets. If the lease was thus *not* necessarily partnership property, it would be erroneous to infer that the sale of the *business* by the firm to the company might or must be assumed to include an assignment of the lease. The four other grounds given by the judge were in our opinion of no relevance on the point. The acts referred to were dictated by practical convenience and had no other significance. What should have been considered as of the highest relevance was the question whether an assignment or subletting was a *sine qua non* to the company entering into occupation of the premises. In our view, it was absolutely unnecessary for any sale agreement to be executed, even as regards the business alone, since the vendors and purchasers were the same three individuals. We could not see how a mere description of the place of business could be construed to imply an assignment, not only of the business, but of the lessee's rights in the premises as well. We were therefore of opinion that in fact there was no assignment of the lease, that the company was let into occupation on the same footing as the firm — by leave and licence of the lessee — and that there was no breach of covenant which rendered the lease liable to forfeiture.

For the above reasons this appeal was allowed with costs and the judgment of the court below set aside.

Appeal allowed.

Solicitors: *Kam Woon Wah & Co.; Shook Lin & Bok.*

MUTHURAKU v. KUALA LUMPUR MUNICIPALITY WORKERS TRADE UNION

[F.C. (Ong C.J. (Malaya), Gill and Ali F.JJ.) June 30,1972]

[Kuala Lumpur — Federal Court Civil Appeal No. 6 of 1972]

Trade Unions — Election of office bearers — Dispute between member and union — Whether court has jurisdiction to hear and adjudicate — Rules of Trade Union — Trade Union Ordinance, 1959, ss. 44 and 45.

The appellant, the president of the respondent union, had issued a writ claiming *inter alia* a declaration that an emergency general meeting of the trade union which was held had no power to decide matters pertaining to the election of officers of the union. The appellant obtained *ex parte* an interim injunction restraining the trade union from holding a general meeting. Upon the application of the trade union this injunction was discharged by the High Court ([1972] 1 M.L.J. 165). It was held that the court had no power to adjudicate over the matter until the procedure for resolving a dispute in Part VI of the Trade Union Ordinance had been exhausted. It was common ground that the method of resolving the dispute by arbitration was not open to the parties. The appellant appealed from the decision of the High Court.

Held: under the rules of the trade union the dispute could only be referred to the Registrar of Trade Unions by consent of the parties, and as the appellant did not agree to do so, he was entitled to refer the matter to the court. The injunction should be restored.

Cases referred to:-

(1) *Kolandaisamy* v. *Annamulai and the Harbour Trade Union (Selangor) Port Swettenham* [1968] 1 M.L.J. 222.

(2) *Tharmalingam* v. *Sambanthan* [1961] M.L.J. 63.

(3) *Hanna Eissa Kawas* v. *Bishara Elias Kawas & others* [1943] 2 All E.R. 530, 531.

(4) *Lawlor* v. *Union of Post Office Workers* [1965] 1 Ch. 712, 733.

FEDERAL COURT.

D. P. Vijandran for the appellant.

M. S. Naidu for the respondents.

Ong C.J.: On August 28, 1971 the appellant, who was and still is president of the respondent union, issued a writ claiming *inter alia* a declaration that an emergency general meeting of the union held on July 18, 1971 had no power to decide matters pertaining to the election of officers of the Union. On the same date the appellant obtained *ex parte* an interim injunction restraining the Union, until trial of the action or further order, from holding the general meeting fixed for August 29, 1971 or any other general meeting. Upon the application of the union this injunction was discharged by an order of court made on January 7, 1972: *see [1972] 1 M.L.J. 165.* On appeal by the appellant against that order, we restored the injunction and now state the grounds of our decision.

The crux of the matter lies in the proper interpretation of Rule 26 of the Rules of this Union, read in the context of Part VI of the Trade Union Ordinance 1949 which comprises sections 44 to 46. This particular rule is in precisely the same terms as the Rule 26 which fell to be considered in *Kolandaisamy* v. *Annamalai & The Harbour Trade Union (Selangor) Port Swettenham.*[1] The relevant portions of the rule reads: —

"*Rule 26 — Disputes*

Every dispute between

(a) a member or person claiming through a member or under the Rules, on the one part, and the Union or an officer thereof, on the other part; or

(b) any person aggrieved who has ceased to be a member of the Union or any person claiming through such person aggrieved, on the one part, and the Union or an officer thereof, on the other part; or

(c) the Union and an officer of the Union;

shall be decided by reference to arbitration.

2. A panel of not less than five arbitrators, none of whom being directly or indirectly interested in the funds of the Union, shall be appointed as a Permanent panel of arbitrators by an annual general meeting, and any vacancy or vacancies shall be filled at a subsequent general meeting.

5. There shall be a right of appeal to the annual general meeting whose decision shall be binding and conclusive:

Provided always that in a dispute connected with

(a) the election of officers or the Union; or

(b) the accounts and funds of the Union; or